

## UNITED STATES DISTRICT COURT

## DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air ) File No. 15-MD-2666  
Warming Devices Products ) (JNE/FLN)  
Liability Litigation )  
) June 15, 2017  
) Minneapolis, Minnesota  
) Courtroom 15  
) 9:45 a.m.  
)  
)  
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BEFORE THE HONORABLE JOAN N. ERICKSEN  
UNITED STATES DISTRICT COURT JUDGE

THE HONORABLE FRANKLIN L. NOEL  
UNITED STATES MAGISTRATE JUDGE

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26 Proceedings recorded by mechanical stenography;  
27 transcript produced by computer.

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## P R O C E E D I N G S

(9:44 a.m.)

THE COURT: Mr. Blackwell, I thought you were saying the pledge of allegiance. Often when I'm in this courtroom, it's because I'm doing a Naturalization.

MR. BLACKWELL: Who knows what will be said by the end, Your Honor.

I wanted to introduce the Court to our summer associate who is here Khansaa Nadeem, who is a first year student at the University of Minnesota, and I invited her to come to see how justice is dispensed.

THE COURT: So you'll be going down to the ninth floor later? You know we have someone, you have someone, don't you?

MAGISTRATE JUDGE NOEL: Yes, I have both of my law clerks because my senior law clerk Carrie is leaving us at the end of the summer, and Chad will be filling in her shoes. And in between the two of them is Maxim Hoes, who is a lawyer from the Netherlands, who is a judicial observer at the University of Minnesota and has been working in my chambers all semester, so.

THE COURT: So do you two University of Minnesota people know each other?

(Off the record discussion between the students.)

THE COURT: Oh, wait a second. We're not quite

1 ready for you --

2 MR. COFFIN: One of them is an LLM student, so it  
3 doesn't seem fair, same group.

4 THE COURT: Amy, our person, there you are. Amy,  
5 if you don't want to sit so far back. My intern, also at  
6 the University of Minnesota.

7 MAGISTRATE JUDGE NOEL: Okay.

8 THE COURT: All right. Now, let's get  
9 appearances, and I've been informed that there is someone on  
10 the phone perhaps that wants to make a statement.  
11 Mr. Gordon, do you want to go ahead?

12 MR. GORDON: Your Honor, that may or may not be  
13 necessary. It kind of depends on you. There are a couple  
14 of lawyers on the phone who may be, I believe, will be,  
15 their cases may be the subject of some of the motions to  
16 dismiss that Mr. Hulse, I believe, may argue. And if the  
17 Court entertains those motions, well, let me say, first,  
18 I'll be prepared to make some general comments, but those  
19 lawyers before their cases potentially get dismissed, I  
20 think would like to be heard as well, Your Honor.

21 THE COURT: Would that be the lawyer for Fraley,  
22 Wilburn?

23 MR. GORDON: Yes, Your Honor.

24 THE COURT: DePriest?

25 MR. GORDON: Yes, Your Honor.

1 THE COURT: Anybody else?

2 MR. GORDON: Well, there is a lawyer from the  
3 Lockridge firm here, Ms. Trembour, is here also to be heard  
4 on --

5 THE COURT: Weimer?

6 MR. GORDON: -- on the Weimer case, yes, Your  
7 Honor.

8 THE COURT: Yeah, I'm not going to dismiss Weimer.

9 MR. GORDON: I'm sorry, Your Honor?

10 THE COURT: I'm not going to dismiss Weimer.

11 MR. GORDON: Well, then she will not need to be  
12 heard, Your Honor.

13 THE COURT: Oh-oh.

14 MR. GORDON: And then there are probably two  
15 lawyers on the phone -- that will make things faster -- from  
16 Bernstein Liebhard, that would be Mr. Dae Lee and Mr. Daniel  
17 Burke, so one of them, hopefully, can hear me and may wish  
18 to be heard on those first cases that you mentioned.

19 And, of course, Ms. Zimmerman is on the phone if  
20 the Hager case comes up. And she, unfortunately, is at an  
21 expert deposition on the west coast but she is on the phone  
22 at the moment, I believe.

23 And then I'll address the Bachus & Schanker cases  
24 if those come up, although they may have a lawyer on the  
25 phone as well. I'm not certain. That would Christopher

1 Elliott, I believe, in the event that you consider the  
2 motions on those cases, Your Honor.

3 THE COURT: All right. So we've got Ben Gordon,  
4 Jan Conlin, Chris Coffin, David Hodges, and Michael Sacchet.

5 MR. SACCHET: You got it.

6 THE COURT: And then here we have -- is it Jerry  
7 Blackwell?

8 MR. BLACKWELL: Yes, Your Honor. I pledge  
9 allegiance.

10 THE COURT: And Ben Hulse and Bridget Ahmann.

11 In the interest, well, Mr. Gordon, let me ask you,  
12 we've got the agenda. I understand that you want to make a  
13 couple points and then you want to leave? Tell me what your  
14 schedule is and how we can get through this?

15 I'm prepared to decide, I guess, the order of the  
16 bellwether cases. I've got some tentative ideas about which  
17 ones of these cases to dismiss and which not in response to  
18 the motions to dismiss.

19 MR. GORDON: Those are the two areas I'd be  
20 prepared to answer, Your Honor, to respond to, that is,  
21 number one, the pretrial order concerning the order of the  
22 bellwether trial subject to the Court's perhaps sua sponte  
23 thoughts on that, I may not need to address it, and then on  
24 the Defendant's motions concerning dismissal of various  
25 actions based on PFS irregularities we cite. I'm prepared

1 to address those two things in the order that you wish. And  
2 then I would like to leave, if I may. But if the Court  
3 needs me to stay, I would be happy to change my flight.

4 THE COURT: Nice haircut.

5 MR. GORDON: Thank you, Your Honor. It's my  
6 summer do.

7 MR. BLACKWELL: If I may, Your Honor, since  
8 Mr. Gordon may have to leave, at least I would like to go  
9 over these items that I see on the agenda for today. This  
10 may not involve Mr. Gordon, the issue about of whether  
11 plaintiffs get surrebuttal expert reports, which was raised  
12 by letter with Your Honor's.

13 THE COURT: We're prepared to decide that.

14 MR. GORDON: And Ms. Conlin is prepared to address  
15 that for the plaintiffs.

16 THE COURT: No, we're prepared to rule on that.

17 MR. BLACKWELL: And in terms of just issues with  
18 the schedule and scheduling, there's the request for an  
19 extension of the schedule of 45 days.

20 THE COURT: I'm prepared to rule on that too.

21 MR. BLACKWELL: From plaintiffs. I would like to  
22 raise an issue just with respect to the schedule for all of  
23 the bellwether discovery, which has not been in front of  
24 Your Honor just yet, but would like at least to raise a  
25 point for the Court to consider in that regard.

1           There will be a couple of other questions about  
2     the schedule. It's clear now that the plaintiffs intend to  
3     have case specific experts and disclosures also, at the time  
4     the schedule for bellwether is initially set that wasn't  
5     contemplated by the Court, but if that's going to be the  
6     case now, we might need to discuss whether there should be  
7     built into the schedule some process for each side to name  
8     their respective case specific bellwether experts and  
9     whether there's a separate Daubert process in case specific  
10    issues.

11           THE COURT: Well, it looks like Item 16 on the --  
12    well, no, no, that's my own Item 16, never mind. So  
13    bellwether case specific discovery -- wait a second, 17,  
14    "bellwether case specific dispositive motions," and that  
15    would include Daubert.

16           MR. BLACKWELL: Yes, it would, Your Honor. If  
17    Your Honor makes it clear that is to include Daubert, but  
18    the --

19           THE COURT: We worked on our local rules to try  
20    and make that clear, but I don't know if it worked or not.

21           MR. BLACKWELL: But there may be some issues about  
22    sort of the staging of when the case specific experts will  
23    be disclosed and when they will be deposed and how much time  
24    before the Daubert motions, so that it at least runs  
25    parallel with what we did on general causation experts in

1 the previous section under number 13 and PTO-17.

2 So anyway I raise it because that is something to  
3 discuss yet this morning, and we'll have a point of inquiry  
4 at least with respect to the Court's Daubert proceedings on  
5 general cause, whether Your Honor intends to have a date for  
6 an evidentiary hearing on Daubert, and whether we intend to  
7 build that in.

8 And we have the two motion issues, one of which  
9 being the PFS, which Your Honor is prepared to address. And  
10 the second motion issue relates to a timing issue with  
11 respect to the most recent motion filed by plaintiffs on the  
12 defendant's privilege log, and we weren't able to kind of  
13 come to one mind about the timing for the defendant's  
14 response, and we would like to raise that since we're all  
15 here.

16 And so whether Mr. Gordon needs to be involved in  
17 any of these things other than the ones he just addressed, I  
18 want him to at least say them so everyone can hear them.

19 MS. CONLIN: I'll handle the other one.

20 THE COURT: Okay.

21 MR. GORDON: Your Honor, may I make a housekeeping  
22 question or a point?

23 THE COURT: Yes, go ahead.

24 MR. GORDON: I'm getting a text from one of the  
25 lawyers on the phone indicating there's a lot of buzzing on



1 the line. It may not be anything we can do about it, but it  
2 might complicate oral argument from people on the phone.  
3 I'm not sure.

4 THE COURT: Text them back and see if it helps  
5 when we speak into the microphone.

6 MR. GORDON: They're responding right now, Your  
7 Honor. I see the little dots.

8 You are clear, but no one else is and buzzing  
9 still going.

10 MAGISTRATE JUDGE NOEL: I know the answer to that  
11 then because nobody is speaking into a microphone, so when  
12 you speak, I assume the ones at the table work, but if not  
13 come to the podium and use the ones on the podium, and I'm  
14 sure if you speak into it in a way that it gets amplified in  
15 here, it means I think working well on the telephone.

16 MR. GORDON: Thank you, Your Honor. Let me try  
17 this. Testing 1, 2, 3.

18 MR. BLACKWELL: Testing 4, 5, 6.

19 MR. GORDON: Okay, that worked, but Jerry wasn't  
20 coming through.

21 MR. BLACKWELL: Testing, testing.

22 MR. GORDON: Right, you are exactly right, Your  
23 Honor, they're saying. So all good, we will speak into the  
24 microphones.

25 THE COURT: And, Mr. Gordon, you've got another

1 one over there. This is brand new technology. The reason  
2 we're not in 12 is that they're now installing the same  
3 technology in my courtroom that we have here. So any other  
4 comments or feedback you have about the technology would be  
5 appreciated.

6 It strikes me that we should begin with the  
7 PFS-related motions to dismiss because that way we'll find  
8 out whether anyone on the phone wants to be heard. Why  
9 don't I tell you what my preliminary thoughts are about this  
10 before you launch into your various arguments.

11 The PFS in Johnson is in now, and I appreciate  
12 that it's late incoming and so on, so that's Johnson and  
13 also Weimer. So I'm inclined not to grant the motions to  
14 dismiss on those.

15 I believe that DePriest told his or her lawyer  
16 that they would be getting something in. May 17th there was  
17 some communication. Anyway, nothing is in yet. My thought  
18 on DePriest would be to dismiss but stay the order  
19 dismissing until our next conference in a month.

20 And then on Fraley and Wilburn, the submissions  
21 indicated that there have been no PFS submitted yet, and so  
22 I would be inclined to dismiss Fraley and Wilburn, along  
23 with Toler, Hager, Barrett and Flynn.

24 So Toler, Fraley, Wilburn, Hager, Barrett and  
25 Fling, according to my records, have not submitted a PFS and

1 a lot of time has gone by. There's been plenty, plenty of  
2 notice. The lawyers have tried to track these folks down,  
3 and I think we're to the time when that's it, and they  
4 should be dismissed.

5 Now, first, let me ask whether there is anyone on  
6 the phone, if anyone on the phone wants to be heard, would  
7 you text Mr. Gordon, and we'll try and figure out a way to  
8 have you be heard?

9 MR. GORDON: And, Your Honor, if I may, while  
10 we're waiting for that, and I will say if they don't have my  
11 cell phone number, which hopefully they do, they can  
12 certainly e-mail me as well at bgordon@l1law.com. But I  
13 know, for example, with respect to the cases of Bachus &  
14 Schanker, I know you mentioned Fraley in particular, I  
15 believe some of those, according to my notes from e-mails,  
16 and we've been working on this issue daily, were served in  
17 the last several days.

18 Now, whether they were filed, whether they've gone  
19 through the portal, Mr. Hulse can address that. But, for  
20 example, Fling, and I think the other Bachus & Schanker  
21 cases, Chris Elliott may be on the phone, may be able to  
22 correct me or add to that. I thought, although belatedly, I  
23 believe those were served.

24 With respect to any of those that were not served,  
25 Your Honor mentioned and, of course, I realize this is

1 Mr. Hulse's motion, I would simply ask the Court whether the  
2 Court would consider dismissing those without prejudice to  
3 give those plaintiffs 30 more days in the event that they  
4 have had difficulty being reached by counsel. Many of these  
5 plaintiffs, Your Honor, you understand are very ill. There  
6 have been some who have been hard to reach because of  
7 hospitalization, because of serious other medical  
8 conditions, and it is such an extreme measure to dismiss the  
9 cases with prejudice. We could ask the Court to consider  
10 dismissal without prejudice to give them 30 more days, even  
11 in those instances in which they have not been able to serve  
12 their PFS yet.

13 And I am getting a text, Your Honor. I'll just  
14 read this to the Court:

15 "With respect to Barbara Hager, File No.  
16 16CV00136, this plaintiff has been unresponsive to multiple  
17 calls and letters including certified mail. They have  
18 diligently, trial counsel has diligently attempted to  
19 prosecute the case on behalf of Ms. Hager, but understand  
20 the Court's position and the rationale. And while they  
21 cannot endorse or join a stipulation to dismiss, they are  
22 prepared for whatever action the Court deems appropriate."

23 THE COURT: Okay. Anything from the -- is it  
24 Bernstein Liebhard, the Fraley, Wilburn, and DePriest  
25 lawyer?

1 MR. GORDON: Yes, Your Honor. And my  
2 understanding is that Dae Lee and Daniel Burke filed papers  
3 on those cases recently, and I think you stated their  
4 position with respect to DePriest at least. I believe one  
5 of them may be on the phone and may wish to be heard.

6 THE COURT: Okay. If that's true, text Mr. Gordon  
7 or e-mail him, and we'll try to open up the line, but I have  
8 read the submissions with respect to those three cases.

9 MR. GORDON: Just checking e-mails, Your Honor,  
10 because I'm not sure that those gentlemen have my cell phone  
11 number. Nothing yet. I don't know if the Court wishes --

12 THE COURT: Mr. Blackwell, is there anything that  
13 you want to say?

14 MR. BLACKWELL: Your Honor, it's Mr. Hulse on this  
15 issue.

16 MR. HULSE: Your Honor, we did just receive PFSS  
17 for the Fling case -- the Fling case and the Toler case.  
18 Those came in on the 10th is my understanding.

19 Your Honor, just recognizing the ruling that you  
20 made here, a thousand or more plaintiffs did comply with the  
21 90-day deadline in PTO-14. Approximately, 100 requested  
22 extensions based either on just the lawyers professional  
23 courtesy request or based on a showing of extenuating  
24 circumstances, and we consistently granted those. There was  
25 an example in one of these cases here is the Weimer case.

1 The 90-day deadline for PFSs was meant to be essentially a  
2 self-executing deadline where the Court wouldn't be faced  
3 with hundreds of motions for extensions of time. It was  
4 contemplated that 90 days was going to be adequate.

5 At a minimum, all of these cases, the PFS, where  
6 PFSs were served, it was four months late, some six months  
7 late. None of these plaintiffs gave any justification.  
8 There was no presentation of hardship.

9 PTO-14 also requires expressly that if there's any  
10 opposition to this motion, it must be filed seven days  
11 before the hearing. That wasn't done for the Weimer case.  
12 They filed last night, and we think that that requirement  
13 should mean something.

14 My fear is, and given already the difficulties in  
15 managing an MDL, in managing the PFS process is that the  
16 message that will go out is that you don't need to comply  
17 with the deadlines in PTO-14 unless and until the defendants  
18 have twice listed your case and then they file a motion, and  
19 so I'm concerned about that message being heard.

20 I would also ask at a minimum that this Court  
21 follow what the Court did in the Ethicon MDL at 2016 Westlaw  
22 131.7401, where there was a PFS that was ultimately served  
23 four days after the deadline, and the Court denied the  
24 motion to dismiss but nonetheless imposed -- required the  
25 plaintiffs to pay the defendant's fees and costs incurred in

1 having to bring a motion that they never should have had to  
2 bring.

3 So at a minimum, our request if beyond that the  
4 Court reconsider its decision on the late served PFSs, would  
5 be that at a minimum for those that it also require the  
6 plaintiffs in those cases to bear 3M's fees and costs  
7 incurred in having to bring this motion. I fear we're going  
8 to have to bring many more of these motions going forward,  
9 and that number was likely to be greatly increased if the  
10 message goes out that you don't have to comply in the  
11 90 days. Thank you.

12 THE COURT: Thank you. As time goes by, we will  
13 be talking about non responses that are even later than what  
14 we have now. And the decision in future cases is not  
15 necessarily going to involve the same level of, well, I  
16 guess oversight has two meanings but overlookage that we'll  
17 have right now.

18 So the motions to dismiss are granted and that is  
19 with prejudice. The reason it's with prejudice is that we  
20 need some finality. The whole purpose of this is to make  
21 sure that there aren't people coming in at the last minute.  
22 So the with prejudice dismissals will issue with respect to  
23 Fraley, which is 16CV2755; Wilburn, 16CV2772; 16CV136, which  
24 is Hager; Barrett, 16CV3553.

25 The dismissal with respect to DePriest, 16CV3383,

1 will issue but that Order will be stayed for 30 days. And  
2 the reason for that is that there has been some response to  
3 counsel's inquiry and a promise to get something in. I  
4 appreciate that that's well outside the 90 days, but that is  
5 the Court's Order with respect to the motions to dismiss.

6 MR. GORDON: Your Honor, may I be heard?

7 THE COURT: Yes.

8 MR. GORDON: So I would just say I understand your  
9 ruling. With respect to the Bernstein Liebhard case or  
10 cases, I know Fraley is one, Wilburn is one, maybe I'm  
11 missing one.

12 THE COURT: DePriest.

13 MR. GORDON: Mr. Dao Lee is on the phone. He has  
14 responded by e-mail and would like to be heard if Your Honor  
15 is prepared to at least hear his argument subject to,  
16 obviously, understanding you've just made your ruling.

17 THE COURT: I don't actually know how --

18 MR. GORDON: Well, if I may, under the heading of  
19 due process and opportunity to be heard, I don't represent  
20 those plaintiffs personally. I've made my pitch. He  
21 represents those plaintiffs. And if you are issuing, which  
22 I understand you are prepared to enter an order to dismiss  
23 with prejudice, that is such an extraordinary and harsh  
24 measure, I would ask that you give him an opportunity to at  
25 least be heard.



1           THE COURT: We'll try -- I'll see if I can get  
2           somebody up here to conference them in. But as you know,  
3           the due process rights do not include a right for oral  
4           argument on every motion. You all know that because you  
5           practice in multiple districts.

6           We have reviewed his written submissions, and now  
7           I am working on getting a technical person up here so that  
8           we will be able to conference him in, but I'm hoping that he  
9           plans on saying something different from or in addition to  
10          what was in his written submissions. So I'm --

11          MR. GORDON: Thank you, Your Honor. He is  
12          prepared to go forward when you're ready, and I will e-mail  
13          him that now and ask for any response that he can give me by  
14          e-mail in the interim. In the event that it is not  
15          something different, I'll ask him to tell us that.

16          THE COURT: Okay. You know, we have all of these  
17          people back there, would one of our people, could you do  
18          something about this?

19          MR. GORDON: Actually, Your Honor, he just  
20          responded, and I'll just help save the Court's time. He  
21          said his argument is going to be the same as what's in his  
22          papers, so.

23          THE COURT: Okay. All right. Thank you. And the  
24          ruling then remains. Thank you. And thanks to the lawyer  
25          who is on the phone.

1 MR. HULSE: Your Honor, if I may, may we request a  
2 ruling from the Court on the request that we've made for the  
3 fees that we've incurred in having to bring this motion?

4 THE COURT: That motion is denied.

5 MR. HULSE: Thank you.

6 THE COURT: The motion would have had to be made  
7 in any event because we still have some of these, and I'm  
8 just not going to order it. That's your legal reasoning  
9 there.

10 What do you think we should go to, the bellwhether  
11 order?

12 MR. GORDON: Your Honor, before we do, I'm sorry  
13 to interrupt, there is one other PFS issue that I would like  
14 to raise, and we mentioned in the joint status report and  
15 that relates to something I brought up two months ago, which  
16 was the plaintiff re-signing or re-verification issue. Are  
17 you prepared to hear a very brief pitch on that, Your Honor?

18 THE COURT: All right.

19 MR. GORDON: So am I okay sitting here if I'm  
20 close to the mic?

21 THE COURT: Yes.

22 MR. GORDON: Thank you, Your Honor. And this  
23 relates to the overall general concern I have, plaintiffs  
24 have about these motions to dismiss when they come up. And  
25 as one example I cited this, and it's just one example in

1 the status report, and that is that my law firm in rough  
2 numbers has changed a little over the last few days because  
3 Mr. Hulse and I have been working constantly on updating  
4 these various lists. But my firm has approximately 70 or so  
5 deficiencies or alleged deficiencies of one kind or another.  
6 It doesn't mean that we haven't complied, haven't responded,  
7 it just means that there's something that the defendant  
8 wants corrected or amended or supplemented.

9 Fifty-one of those 72 that at last count involved  
10 the sole issue of whether the plaintiffs have resigned or  
11 reverified that their answers are accurate, verified,  
12 authentic.

13 My first point is, Your Honor, in a dozen MDLs  
14 that I've worked on, no court has ever required that  
15 plaintiffs re-sign or re-verified once they've done so to  
16 begin with. And in many cases, including the Taxotere MDL,  
17 which Mr. Coffin who is behind me from our PEC is lead  
18 counsel on with Judge Engelhardt in the Eastern District of  
19 Louisiana, the Court explicitly put in an Order, over no  
20 objection to my understanding, that plaintiffs and counsel  
21 instead, Your Honor, that counsel -- do you wish should I  
22 stop for a moment?

23 THE COURT: No, I think we've been through this.

24 MR. GORDON: We have, and I thought we'd be able  
25 to work it out with Mr. Hulse, but he decided we couldn't,

1 and he can address that.

2 But the Court in that case over no objections, to  
3 my understanding, Mr. Coffin, correct me if I'm wrong, said  
4 that as long as the plaintiffs have signed their answers  
5 once, and counsel will stand by those answers and agree that  
6 plaintiffs are bound by those answers, then a supplement or  
7 an amendment to the PFS is unnecessary. And it goes to the  
8 process and the efficiency of the process and the reason  
9 that we use PFSs, complicated, burdensome, lengthy PFSs in  
10 MDLs.

11 So while Mr. Hulse would liken it to simple  
12 interrogatory responses that have to be verified,  
13 re-verified, it's not the same. It's explicitly not the  
14 same. The reason for it is to promote efficiency. And,  
15 Your Honor, there is no prejudice to them. In many cases,  
16 you understand, Your Honor, many of my cases that the  
17 re-verification relates only or the amendment or the  
18 supplement relates only to ministerial things like putting  
19 the letters "NA" for nonapplicable in a box, or correcting a  
20 date, or putting a middle initial or a date of marriage or a  
21 date of employment.

22 So Mr. Hulse has told me, and if I'm misquoting he  
23 can correct me, that my cases the 51 out of 72, that this is  
24 the sole issue of re-signing will come up on his motion to  
25 dismiss motion position somewhere in the near future in

1 July, even though there are no substantive deficiencies in  
2 these PFSs, and that's the vast majority of my cases. And  
3 that would be grossly unfair to dismiss a plaintiff's case  
4 because all that has happened is they've signed once but  
5 haven't signed twice. And counsel is willing to stand by  
6 these attestations and bind the plaintiffs by these  
7 attestations, as every other MDL that I know of has always  
8 done.

9 And I'll tell you what happens in every case, Your  
10 Honor, that I've ever worked on. The defendants take the  
11 deposition of the plaintiff, and they ask them again. They  
12 say, "Turn to page 27 of your PFS, is that your signature?"  
13 And they reaffirm at that time that it is an authentic  
14 signature. So this is completely form over substance, Your  
15 Honor. There's no prejudice. And none of these relates to  
16 any of the bellwether cases, so I don't know what prejudice  
17 they can claim, Your Honor.

18 THE COURT: Mr. Hulse?

19 MR. HULSE: Your Honors, paragraph 3 of PTO-14  
20 states, "Plaintiffs' responses shall be treated as answers  
21 to interrogatories under Federal Rule of Civil Procedure 33,  
22 and shall be signed and dated by the plaintiff or the proper  
23 plaintiff representative under penalty of perjury."

24 The PFSs are required to be verified. In hundreds  
25 and hundreds of cases there have been questions, substantive

1 questions that were identified as core questions in PTO-14  
2 that were not answered. We sent out deficiency notices.  
3 The plaintiffs responded by attempting and successfully in  
4 many instances curing the deficiencies by providing  
5 additional information. It often involves naming the  
6 doctors, the hospitals, the bacteria that they say they were  
7 infected with. This is important information in most cases.  
8 Again, the information that was identified as core expressly  
9 in PTO-14, we are only pursuing deficiencies for core  
10 deficiencies under PTO-14.

11 So when that new information comes back given the  
12 language of paragraph 3 here, it needs to be verified. This  
13 is substantive information being provided by the plaintiff.  
14 If it had been provided in the original PFS, it would have  
15 had to be verified, and it has to be verified if it's  
16 presented later. Otherwise, and what we face, and we do  
17 face this in many cases is that we get a radically  
18 incomplete first PFS. We get a significant amount of  
19 information in a second or third amended PFS, but then we  
20 have no verification to go through.

21 And a verification, of course, under Rule 33 and  
22 under the PFS provides an incredibly important function. It  
23 is a gut check for the plaintiff, him or herself to say am I  
24 providing truthful and complete information? And if we  
25 don't have that for the amended and supplemental responses,

1 we can't have that confidence and assurance that that gut  
2 check has occurred.

3 In any event, our viewpoint has been that  
4 paragraph 3 clearly requires it. There's no exemption for  
5 it. And I also want to say that this is an issue, there are  
6 150 cases that have this specific defect where the  
7 verification for the amended PFS is the only thing missing.  
8 Seventy-five of them are from Mr. Gordon's firm. There is  
9 only one other firm that has more than 10 with this issue  
10 and most firms have 1, 2, 3. All other firms to our  
11 knowledge have been working with or have shown to be working  
12 with or working to get the verifications for amended  
13 responses. So we have seen this issue as very much a  
14 specific issue to Mr. Gordon's firm. We understand that he  
15 has a principled objection to it, but we think it's not  
16 supported by PTO-14.

17 THE COURT: Are the deficiencies, what are you  
18 doing about the non-core deficiencies?

19 MR. HULSE: Under the process, we are not sending  
20 any kind of notice around on core deficiencies. All the  
21 PTO-14 provides for is notification around core  
22 efficiencies.

23 THE COURT: It sounds like he's saying, I don't  
24 know, I can't remember the example married or non-married.

25 MR. HULSE: Yes, well, that's identified as, that

1 kind of information is core under PTO-14. So anything that  
2 we have notified about falls expressly under the list of  
3 core areas under PTO-14. And, of course, you know, the  
4 identity of a spouse, that's important. That is basic  
5 information for one of these cases. So but much of the time  
6 it's not that. It's the information about the medical  
7 procedures, bacterial infections, so forth, whether they  
8 communicated with Augustine. All areas identified by  
9 agreement of the parties when they proposed this to Your  
10 Honors as core areas.

11 MR. GORDON: Your Honor, may I say one thing or  
12 would I be better off not?

13 THE COURT: What's the expression when you're in a  
14 hole?

15 MR. BLACKWELL: That's a good expression, Your  
16 Honor.

17 MR. GORDON: I won't speak if you tell me not to,  
18 Your Honor.

19 THE COURT: I'm not going to amend the pretrial  
20 order at this point. The litigation has been proceeding on  
21 that order, and there's no good reason to change it at this  
22 point, at least no reason that is persuasive to the Court.

23 MR. GORDON: And, Your Honor, I don't think we  
24 need an amendment. My bottom line position is that counsel  
25 has agreed and will agree, and as a compromise to Mr. Hulse,



1       that we will commit to the veracity and the authenticity of  
2       all the signatures for all amendments.

3               THE COURT: I know, and that's not consistent with  
4       the order if you want to agree on something that's not in  
5       the order, you can do that. But as it stands, if the PFSS  
6       are to be treated like interrogatories, they have to be  
7       verified. So your request for Court assistance in your  
8       attempts to work things out with Mr. Hulse is denied.

9               MR. GORDON: Thank you, Your Honor.

10              THE COURT: Bellwethers. How about this for an  
11       order? We'll put the Ramsey County case second, unless you  
12       want that to go first. I thought maybe you would start with  
13       a federal case.

14              MR. BLACKWELL: Your Honor, we certainly agree  
15       with starting with the federal case, and the question we  
16       have is whether given the volume of federal cases, it might  
17       be good to have two of those first and then Ramsey.

18              THE COURT: I spoke with Judge Leary yesterday,  
19       and he sooner rather than later is better from his  
20       perspective, but he's not asking to go first. He's, you  
21       know, whatever happens is fine.

22              So we will do, here's the order: Kamke, Nugier --  
23       is that how you pronounce that?

24              MR. GORDON: Your Honor, we've been saying,  
25       "Nugear", but some people say "Nugear," David, do you have

1 an answer to that?

2 MR. HODGES: I used to know that answer, I don't  
3 now.

4 THE COURT: 16CV4246; Walker, which is the Ramsey  
5 County case; Knuteson, or as people from New York like to  
6 pronounce it "Nutson;" Skaar, Gareis, and that's partly with  
7 the benefit of the popcorn bowl. Mr. Gordon, are you okay  
8 with that?

9 MR. GORDON: Yes, Your Honor, I think plaintiffs  
10 are okay with that order.

11 THE COURT: Okay.

12 MR. BLACKWELL: Perfect, Your Honor.

13 THE COURT: Let's talk about --

14 MR. BLACKWELL: Judge Ericksen, before the Court  
15 moves on to another subject, now that we have bellwethers, I  
16 at least wanted to broach this issue with the Court.

17 I was sort of doing a survey of the discovery that  
18 is set to be happening in all these cases between now and  
19 October 2nd, or rather between June 2nd and October 2nd.  
20 And just previewing it, there are the 20 expert depositions that  
21 are taking place. The plaintiffs have sent out 11 deposition  
22 notices for treatise, et cetera.

23 THE COURT: Next, on my own personal agenda is the  
24 schedule. Is that where you are working towards?

25 MR. BLACKWELL: It is. And I was going to suggest

1 maybe Your Honor contemplate now that we have the order of  
2 the bellwethers, perhaps it would be possible to have some  
3 case specific schedules put in, such that it's more of kind  
4 of a rolling discovery response on at least the handling of  
5 those cases, such that it can be more tailored to each case  
6 so we're not doing a hundred depositions in four months.

7 THE COURT: Okay. Let me think about that in a  
8 minute, and I want to talk to Judge Noel about that. Having  
9 reviewed the recent submissions having to do with the  
10 current schedule, I accept that some adjustment to the  
11 schedule makes sense.

12 At the moment, we've got depositions of experts to  
13 be completed on or before August 2nd. I'll move that to --  
14 (crackling noise on speakers) -- \$250,000 worth of  
15 improvements and that's what we get. I want you to be happy  
16 when you pay your taxes.

17 Okay, depositions, I'll move that to August 16th.  
18 Depositions of expert witnesses to be completed on or before  
19 August 16th.

20 Daubert and other dispositives general, to be  
21 filed rather than no later than August 15th, September 5th.  
22 So dispositives including Dauberts filed by September 5th.  
23 The opposition papers due September 26th, and the reply  
24 October 10th. I am free on October 25th, and also I think  
25 the day before and after that, so around that time we can

1 discuss how much time is needed, but that seems to be a good  
2 time. Works for everyone on our end.

3 MR. GORDON: Your Honor, from the plaintiff's  
4 standpoint, that's good for us. And with the Court's  
5 permission, I'm going to slip out.

6 THE COURT: Oh, bye.

7 MR. GORDON: Thank you, Your Honor.

8 MR. COFFIN: I'm going to go with him, Your Honor.

9 THE COURT: Bye.

10 MR. COFFIN: Thank you.

11 THE COURT: Mr. Gordon, look it, all your friends.

12 MR. GORDON: I'm sorry, Your Honor.

13 THE COURT: I feel like I wasn't invited to the  
14 party.

15 MR. HULSE: The entourage has left.

16 THE COURT: So first bellwether trial was  
17 scheduled to start on February 5th. Ms. Conlin, are you  
18 happy with your seat or did you want to move over?

19 MS. CONLIN: Oh, I'm okay here, Your Honor.

20 THE COURT: All right. And we'll move that to  
21 February 26th. Bellwether case specific discovery is now  
22 scheduled to be completed no later than October 2nd, and I  
23 understand that that has started because we're past the  
24 June 2nd date. So rather than October 2nd, I will make that  
25 October 16th. And then bellwether case specific dispositive

1 motions filed no later -- rather than November 1st, make  
2 that November 15th.

3 Setting aside for the moment, Mr. Blackwell, your  
4 point about some rolling discovery and so on with the  
5 bellwethers, is that agreeable with you that schedule?

6 MR. BLACKWELL: Well, it is. As Your Honor  
7 articulated it with this asterisk, and that relates to the  
8 November 15th date for dispositive motions for the  
9 bellwethers, the case specifics. And it's now that we know  
10 that plaintiffs are in fact going to also be naming case  
11 specific experts, it would be I think proper as with respect  
12 to the general causation disclose of experts that the  
13 plaintiffs -- we have a date for the plaintiffs to disclose  
14 their case specific experts, and then a date for rebuttal  
15 experts, so that we know first what it is they are going to  
16 put on with respect to case specific experts on the issue of  
17 specific causation before we respond to it, and the date of  
18 November 15th, Your Honor, could still nonetheless work just  
19 fine for filing any Daubert and/or the dispositive motions,  
20 but we're requesting whether it's possible to build in dates  
21 for the plaintiffs disclosures of case specific experts on  
22 specific cause, and a date for the rebuttal from the  
23 defendant.

24 THE COURT: Ms. Conlin, what kind of experts are  
25 we talking about for these case specifics?

1 MS. CONLIN: It's possible that in a specific case  
2 we may want, for example, an anesthesiologist or an  
3 orthopedic surgeon, but there is going to be considerable  
4 overlap between the experts that we've disclosed and perhaps  
5 our case specific experts. So perhaps to the extent we're  
6 going to name somebody new for a case specific putting in a  
7 deadline for that, that would be fine, but right now, we've  
8 also got our main experts who may be opining on case  
9 specific issues as well.

10 MAGISTRATE JUDGE NOEL: When you talk about an  
11 orthopedic surgeon or an anesthesiologist, would these be  
12 treating doctors or just some orthopedic surgeon who has  
13 expertise in infectious disease in connection with open  
14 wounds or something like that?

15 MS. CONLIN: Well, it could be a treating  
16 orthopedic surgeon or it could be an orthopedic surgeon  
17 that's opining on a case specific issue.

18 THE COURT: Do you know now whether you'll be  
19 having any such experts?

20 MS. CONLIN: The only experts that we're looking  
21 at right now is potential additional case specific maybe in  
22 the area of anesthesiology in light of some of their  
23 reports, which actually sort of gets into some of the  
24 rebuttal issues as well.

25 MR. BLACKWELL: And, Your Honor's, with all due

1       respect, I think it's going to remain so be seen, when we  
2       last addressed this issue before the Court, there were not  
3       going to be any case specific experts from plaintiffs.

4               MS. CONLIN: Well --

5               MR. BLACKWELL: May I finish, please?

6               MS. CONLIN: Sure.

7               MR. BLACKWELL: That has evolved as I expected it  
8       might because the second phase of the case is going to be  
9       supremely about how amongst a panoply of causes for surgical  
10      site infections do you determine it's the Bair Hugger. And  
11      there will have to be some testimony from the plaintiffs for  
12      how it is you have a reasonable scientific basis for  
13      excluding all of the other causes on a case specific basis,  
14      and that's what this phase will go to. That's why we are  
15      going to need case specific experts, and we presume there  
16      will be something from the plaintiffs that's also addressing  
17      this issue on a case specific basis because it won't be  
18      enough to simply rule the Bair Hugger in as a possible cause  
19      on a general causation.

20              THE COURT: You think that might be a different  
21      expert than the?

22              MR. BLACKWELL: They may be the same  
23      personalities, the same individuals, and but who the  
24      plaintiffs may put up in that regard not certain. We may  
25      have at least maybe a different expert, for example, on

1 damages on a case specific basis. But for the most part, it  
2 will be the other experts we've also named who just have  
3 case specific opinions also.

4 MS. CONLIN: And that actually was the point I was  
5 going to raise, and I didn't mean to interrupt you, but,  
6 obviously, with respect to damages on case specifics, there  
7 are going to be experts that testify in that. The  
8 fundamental disagreement between the parties, and you heard  
9 Mr. Blackwell articulate it again here today is we don't  
10 have to rule out every other cause. The law in Minnesota is  
11 whether the Bair Hugger was a substantial contributing cause  
12 to the infection. We believe that our experts will show  
13 that's the case.

14 THE COURT: So is there any reason case specific  
15 experts' depositions can't be on the same schedule or  
16 completed also by August 16th?

17 MR. BLACKWELL: The reason it may not work, Your  
18 Honor, is because we are just getting underway with the  
19 discovery itself, and we will not have been complete. We  
20 frankly will not have had all the information back from the  
21 various hospitals and facilities about their trend of causes  
22 by that August date, and I don't expect that when we serve  
23 discovery in the hospitals that they will be anxious to  
24 disclose to us what the history of surgical site infections  
25 have been at those facilities, and so I expect that's going



1 to be motion practice that's going to slow things down also.

2 But I don't think, Your Honor, by that date we'll  
3 have enough foundation information to be able to disclose  
4 the case specific opinions, and we're probably going to need  
5 that whole time period through October now 16th just to get  
6 at it.

7 MS. ZIMMERMAN: And, Your Honor's, this is  
8 Genevieve Zimmerman. I don't know if you can hear me on the  
9 phone right now.

10 MS. CONLIN: We can.

11 MS. ZIMMERMAN: Okay. I would just add to what  
12 Ms. Conlin has represented to the Court that there may be  
13 also additional reports that we would like to disclose from  
14 experts whom we have already disclosed who will opine on  
15 case specific issues. So, for example --

16 THE COURT: Here's what -- hold on.

17 MS. ZIMMERMAN: Okay.

18 THE COURT: It sounds like you are in agreement  
19 that it makes sense to have some allowance for case specific  
20 experts.

21 MR. BLACKWELL: Yes, Your Honor.

22 THE COURT: And we have a dispositive motion on  
23 bellwethers a filing of November 15th, and it sounds like  
24 that is a realistic date. What do you think the prospects  
25 would be, Mr. Blackwell and Ms. Conlin, for an agreement

1 with respect to the schedule of taking experts?

2 MR. BLACKWELL: You mean in terms of us getting  
3 together to propose something?

4 THE COURT: Right, rather than us just coming up  
5 with a date.

6 MR. BLACKWELL: She's a supremely reasonable  
7 person.

8 THE COURT: So are you.

9 MR. BLACKWELL: My wife says so.

10 MS. CONLIN: Mr. Blackwell and I will confer and  
11 get back to the Court on that.

12 MR. BLACKWELL: Yes, Your Honor.

13 THE COURT: Okay, perfect, thank you.

14 MR. BLACKWELL: Just for the record, Your Honor,  
15 we don't agree on Ms. Conlin's assertion that Minnesota law  
16 applies to these bellwhether cases first off, much less that  
17 she correctly cited what the law is.

18 THE COURT: That was not really on the agenda  
19 anyway so.

20 MR. BLACKWELL: It's not, Your Honor.

21 THE COURT: But it was noted.

22 Okay. Now, the St. Louis cases, I would like to  
23 talk -- who wants to talk about the St. Louis cases for the  
24 plaintiffs' side?

25 MS. ZIMMERMAN: Hopefully, Ms. Zimmerman can

1 unmute her phone and address that.

2 MR. BLACKWELL: And, Your Honor, hopefully for us  
3 someone other than me, possibly Ms. Ahmann.

4 THE COURT: Ms. Zimmerman? We just heard from  
5 you.

6 MS. ZIMMERMAN: Yes, Your Honor.

7 THE COURT: Okay. Jennings, Weisbrod, and  
8 Galbreath, and then separately Washington, the St. Louis  
9 cases.

10 MR. HULSE: Right. And Washington is not  
11 transferred yet.

12 THE COURT: Separately Washington.

13 MS. ZIMMERMAN: Yes. I'm sorry, the connection  
14 continues to be a little bad and maybe that's on my end. As  
15 we reported to the Court in the status report, there are  
16 four cases left by the Simon Law Firm, and there are I think  
17 almost 200 plaintiffs, five in the city of St. Louis or  
18 Missouri were removed by the Court.

19 And it is my understanding, although I'm not  
20 well-versed on the issue that there is a recent Supreme  
21 Court decision in Missouri that impacts the ability of the  
22 joinder of multiple clients that may or may not have  
23 diversity issues, and I don't know the status of that, but  
24 that is my understanding.

25 So there are, I believe, three separate firms,

1 none of whom are involved with the MDL, but they have all  
2 been involved in the cases in Missouri, and now some of  
3 those cases are pending transfer to the MDL.

4 THE COURT: Well, haven't three of the cases been  
5 transferred?

6 MS. ZIMMERMAN: That is my understanding, yeah.

7 MR. HULSE: And, Your Honor, I'm in almost daily  
8 contact with the counsel at the Brown & Crouppen firm, which  
9 has now appeared for plaintiffs in the cases that have been  
10 transferred. The Simon firm, which originally still has the  
11 Washington case, but my expectation is Brown & Crouppen  
12 would substitute in too. Seth Webb is his name. I don't  
13 know if he may be on the line right now, but otherwise I'm  
14 pretty up to date on where they're at.

15 THE COURT: Should we ask, Mr. Webb, are you on  
16 the line? He's texting Ben Gordon, who is on the airplane.  
17 Ben Gordon is gone.

18 MR. HULSE: Just yesterday, Your Honor, we  
19 consented to the plaintiffs' motion to sever the plaintiffs  
20 in all three of those cases to get them assigned, of course,  
21 fully support this, assigned individual case numbers. They  
22 then intend to file short form complaints. We've negotiated  
23 the deadline for PFSs in recognition that they've got  
24 200 cases to handle. They've just came in as counsel, and  
25 so that's, and I understand their intention once the

1 severance has happened is to dismiss the nondiverse cases  
2 and then, ultimately, get them re-filed in Ramsey County.  
3 So but they have --

4 THE COURT: Our clerk's office is wondering what  
5 to do about these. So from your point of view, the clerk's  
6 office can go ahead and assign individual numbers to these  
7 without problem?

8 MR. HULSE: Yes.

9 THE COURT: Okay, I was holding off on giving the  
10 okay on that.

11 MR. HULSE: Yes, I think that will make it much  
12 more manageable for everyone.

13 MAGISTRATE JUDGE NOEL: But do I understand you to  
14 say though that there's going to be a written stipulation to  
15 that effect?

16 MR. HULSE: There's actually been a motion, an  
17 unopposed motion already filed.

18 MAGISTRATE JUDGE NOEL: Okay.

19 MR. HULSE: And I'm confident that when and if  
20 Washington is transferred, that it will proceed the same  
21 way. But I know definitively they've said they don't intend  
22 to pursue remand on these cases anymore.

23 THE COURT: The reason for our question is the  
24 line in the joint agenda that says, "In addition, defendants  
25 request that the Court sever the remaining plaintiffs into

1 individuals. If required, defense will file a formal  
2 motion." So it's --

3 MR. HULSE: Something that's never happened, the  
4 plaintiffs did our work for us. They actually went ahead  
5 and filed.

6 THE COURT: You know, they probably do it a lot  
7 more than you give them credit for.

8 MR. HULSE: We welcome it.

9 THE COURT: Is there anything else, Ms. Conlin or  
10 Ms. Zimmerman or Mr. Hulse that we should talk about with  
11 respect to the St. Louis cases?

12 MR. HULSE: No, Your Honor. Like I said, I'm  
13 working on an almost daily basis with Brown & Crouppen to  
14 manage sorting those cases out, so severance will be  
15 helpful.

16 THE COURT: Okay. Ms. Zimmerman, are you okay  
17 with --

18 MS. ZIMMERMAN: Your Honor, if there's anything we  
19 can do to assist the Court, we dealt with this exact issue  
20 two months (inaudible), again, hundreds of clients that have  
21 been transferred in a similar way, if there's something we  
22 can do to help out.

23 THE COURT: All right. Thank you. The state  
24 proceedings, is there anything that needs to be said about  
25 the state proceedings. Ms. Ahmann?

1 MS. AHMANN: No, Your Honor, there's nothing to  
2 add.

3 THE COURT: Okay.

4 MS. CONLIN: No, Your Honor.

5 THE COURT: Okay. Is that true with respect to  
6 Canada as well? It looks like there's been no change there.

7 MR. BLACKWELL: No change, Your Honor.

8 THE COURT: And we've talked about the Super Bowl.  
9 The motion on the confidential designations is ready for  
10 hearing and will be heard, right? Okay. Is there anything  
11 else you have?

12 MAGISTRATE JUDGE NOEL: Okay, the only other thing  
13 I have to address is your respective letters regarding --  
14 your respective letters of June 6th and 8th regarding  
15 initial and rebuttal expert reports.

16 I think we've covered this previously. It's the  
17 Court's position that whichever party has the burden of  
18 proof on an issue as to which you wish to call an expert  
19 witness, you need to disclose that report and the identity  
20 of the expert in accordance with the initial expert  
21 disclosure dates.

22 Any party who wants to call an expert witness to  
23 rebut what an initial expert's report has said needs to  
24 disclose a rebuttal expert report by the rebuttal disclosure  
25 date. There will be no replies to expert rebuttal reports.

1 The only thing left to do after an initial report and a  
2 rebuttal report have been disclosed is to depose each of  
3 those experts.

4 Are there any questions about that process?  
5 Ms. Conlin?

6 MS. CONLIN: I do, Your Honor, and the reason why  
7 we've raised it again was because we now have in the expert  
8 reports that were served by 3M on June 2nd. Let me give you  
9 a real life example of why we raised this issue.

10 We put in an initial report from Dr. Elghobashi,  
11 who was a CFD expert, who performed computational fluid  
12 dynamics work in this case. On June 2nd, we got in a  
13 rebuttal report from Mr. Abraham, whom I believe you recall  
14 was 3M's CFD witness at the science day hearing. He did, in  
15 fact, rebut Dr. Elghobashi's CFD work, but he also put in  
16 his own model that he did independently that he's  
17 affirmatively putting in evidence at trial.

18 My concern is we want to rebut that report. I  
19 mean and if it's through asking the questions at the  
20 deposition, that's fine, but they're going to put up  
21 affirmative evidence in their defense case, which our  
22 experts, if they listen to at trial or whatever, should have  
23 an opportunity to respond to and that's the issue.

24 I mean we've got, another example is we've got Dr.  
25 Lampotang for 3M who opined, which seemed curious in light



1 of the Court's rulings in the last couple of months, that  
2 the Bair Hugger is twice as effective in keeping the patient  
3 temperature increased as opposed to the HotDog. So are we  
4 to be able to rebut that when we hear that evidence at trial  
5 or are we hamstrung by what's happened in light of some of  
6 the prior rulings?

7 We just, you know, however the Court wants to  
8 handle it, but we have an absolute right to present a  
9 rebuttal case at trial, and we would like to be able to do  
10 that.

11 MR. BLACKWELL: Your Honor, if I may, I certainly  
12 disagree that it's an absolute right. And to the extent  
13 it's a right at all, they do have opportunity to explore  
14 whatever experts have said in the depositions of their  
15 experts and in the cross examination of our experts.

16 And I note for the Court that the plaintiffs have  
17 in response to our deposing experts been putting in upwards  
18 of an hour-plus of direct examination specifically for this  
19 purpose. So they're in fact doing it. And to point to some  
20 isolated instance of Elghobashi with respect to a CFD from  
21 Dr. Abraham, which has been in the public domain on 3M's  
22 website for a year. They have had it.

23 So this isn't some secret thing that just kind of  
24 came up kapoof. In fact, Your Honor's saw it on science  
25 day, same thing. So they've known about that, so they trot

1       that out to use it as a fulcrum for getting surrebuttal  
2       reports for everyone. And that just sets off exactly this  
3       cascade Your Honor's would like to avoid of having  
4       rebuttals, reaction with at least another rebuttal, another  
5       reaction, and it goes on and on in a process that will never  
6       respect any court schedule if that's allowed.

7               So to the extent that it seems to me that if the  
8       plaintiffs have further exploration, if our experts have  
9       said things that are irrelevant, the rules address that. If  
10      they feel that our expert reports are flawed, that's what  
11      cross-examination is for. If their experts have anything  
12      more to say, they've been exploring that in our deposition  
13      of their experts by taking directs on their experts. So it  
14      seems to me that the plaintiffs' needs are being addressed  
15      under the current rules, under the current schedule, and  
16      there's not a need for this sort of cascading process of  
17      surrebuttals and responses from us.

18             MS. CONLIN: Well, we didn't know whether they  
19      were calling Mr. Abraham as an expert. And in point of  
20      fact, we've had to serve when they've now identified them  
21      with report, we sent out subpoenas. We're still waiting for  
22      that information. We expect to start getting it on  
23      June 21st.

24             We're fine with not, we understand what the Court  
25      has ruled. We're simply saying I see this issue coming down

1 the pike. And if we get to trial, and Mr. Abraham gets up  
2 and talks about his CFD model, we want to be able to call  
3 Dr. Elghobashi in rebuttal and explain why that's wrong.  
4 That's all. And we have been doing directs because we feel  
5 like that's the one way to get out why our experts think  
6 what their experts are saying is wrong.

7 MAGISTRATE JUDGE NOEL: Okay. I think the Court  
8 has ruled that there will be no expert surrebuttal reports.  
9 The report is an initial report, there's a rebuttal report,  
10 and there are depositions, and it sounds to me like the  
11 depositions are serving their function.

12 Anything else on that issue, Ms. Conlin?

13 MS. CONLIN: No, Your Honor. As long as we're  
14 going to be able to present it in rebuttal at trial, we're  
15 fine with the order.

16 THE COURT: We're not making trial rulings at this  
17 point.

18 MAGISTRATE JUDGE NOEL: Anything else, Mr.  
19 Blackwell?

20 MR. BLACKWELL: In light of that, no, nothing else  
21 on that issue, Your Honor.

22 MAGISTRATE JUDGE NOEL: Okay.

23 THE COURT: Anything else, Ms. Conlin?

24 MS. CONLIN: No, Your Honor.

25 THE COURT: Not just on that, but on anything?

1 MS. CONLIN: No.

2 THE COURT: All right. Mr. Blackwell?

3 MR. BLACKWELL: Your Honor, just a couple of other  
4 things. And if I could go back to the bellwhethers for just  
5 one second.

6 Has the Court given any thought as to whether or  
7 not the bellwether cases will be tried back to back or what  
8 might be sort of the pace of these? And I ask that because  
9 as I was sort of previewing again the discovery to be done  
10 between June and October, that there really could be upwards  
11 of a hundred depositions, and it might be, and I say that  
12 because in each case each of the six bellwhethers, I was  
13 sort of making my list of who it is from the different  
14 hospitals may have some information to bear on what causes  
15 surgical site infections in that facility, family members,  
16 et cetera, treaters. And depending on the pace of the  
17 bellwhethers, there might be some benefit if the parties  
18 could get together and propose perhaps some schedules that  
19 may be specific tailored to each bellwether case, if the  
20 Court is receptive to hearing that.

21 MAGISTRATE JUDGE NOEL: Have the parties given  
22 thought to how long they anticipate each bellwether trial to  
23 take?

24 MR. BLACKWELL: We haven't discussed it, but --

25 MS. CONLIN: My guess is a rough estimate of

1       probably two weeks or under with jury selection, opening  
2       statements, closing arguments, and the like.

3               MR. BLACKWELL: And my gut reaction was three  
4       weeks, Your Honor.

5               MS. CONLIN: Well, I forgot about a rebuttal case.  
6       That would require another week.

7               MR. BLACKWELL: We can handle that through motion  
8       practice, Your Honor.

9               THE COURT: Well, especially if we don't get two  
10       new judges in this district, we might have to have a week or  
11       we might have to have some time in between anyway. I just  
12       don't see how we have the court time to go.

13              MR. BLACKWELL: So if we were, for example, going  
14       to stage them, if you had, for example, two federal cases,  
15       number one and number two up, and there were going to be a  
16       week in between them, we could prioritize the discovery to  
17       have both of those ready by whatever the dates are in the  
18       current PTO, but then be able to stage some of the discovery  
19       with respect to the others to better kind of fit when  
20       they'll actually get tried, so that we can actually focus on  
21       the ones that are coming up for trial.

22              (PHONE VOICES HEARD TALKING.)

23              THE COURT: Did you put that some place safe?

24              MR. BLACKWELL: I think you silenced that  
25       conversation. I think they were discussing their lunch.

1 MS. CONLIN: We can probably talk with  
2 Mr. Blackwell about that issue if the Court is inclined to  
3 allow us to explore that further. I do think it makes sense  
4 if we know what's upcoming at first now, prioritize those in  
5 terms of discovery, and we can probably work something out.

6 THE COURT: That's good. Otherwise, I'm worried  
7 that we'll have orders that are unnecessarily specific and  
8 won't really work in the real world because we're talking  
9 about trial schedules that are sometime next week or year,  
10 so if you are able to work it out within the limits of the  
11 existing schedule, work out what you can, and we'll leave  
12 the schedule as it is. But you, obviously, can work things  
13 out.

14 MR. BLACKWELL: We'll see what we might propose,  
15 Your Honor.

16 THE COURT: All right.

17 MS. CONLIN: Although, Mr. Blackwell is extremely  
18 unreasonable.

19 THE COURT: Still?

20 MS. CONLIN: Well, he called me that, so I just  
21 thought it appropriate to call him that too. No, we'll work  
22 it out and come to the Court if we have issues.

23 MR. BLACKWELL: Thank you, Your Honor. There is  
24 one last issue, however.

25 THE COURT: Mr. Blackwell?

1 MR. BLACKWELL: Your Honor, if I may have  
2 Mr. Hulse speak to this, there is a certain issue about  
3 privilege log and the timing for response for it whether  
4 there is something we should differently address with the  
5 Court or whether there's something we can work out with  
6 plaintiffs, we tried, but it didn't happen.

7 MS. CONLIN: Mr. Hulse had asked for an extension  
8 to respond, which would necessarily kick out the hearing  
9 date. What I told him this morning was in light of the  
10 amount of work we had in July, I wasn't inclined to have a  
11 motion in the middle of it. In light of the fact that we've  
12 gotten some relief on when things are due in July and  
13 extending out that expert discovery, the long and short of  
14 it is I think we can work out an extension and have a  
15 hearing set in July.

16 MAGISTRATE JUDGE NOEL: Is this relating to the  
17 hearing that we already have set for the privilege log?

18 MS. CONLIN: Correct.

19 MR. HULSE: This is the one that plaintiffs set  
20 for the 26th.

21 MAGISTRATE JUDGE NOEL: 26th of June.

22 MR. HULSE: Right. Where they are seeking in  
23 camera review of about 700 documents. So we called over and  
24 understand that Your Honor would be available for hearing on  
25 the 17th. We know you're out the week before, and that's

1 the date that we would propose to have this heard, if it's  
2 amenable to plaintiffs, with our response due seven days  
3 before.

4 MS. CONLIN: And I think it is now. My issue was  
5 we have triple track depositions on July 18th, and I think  
6 we can work that out and have the hearing on the 17th now.

7 MAGISTRATE JUDGE NOEL: With this caveat, Theresa  
8 is out today, so tomorrow call her and make sure that she  
9 knows what you've just said and that that's still the case  
10 with regard to my schedule. But now you're saying -- I'm  
11 sorry, the hearing was scheduled for?

12 MR. HULSE: The 26th of June.

13 MAGISTRATE JUDGE NOEL: And now you're saying July  
14 the 17th?

15 MR. HULSE: Correct.

16 MAGISTRATE JUDGE NOEL: Okay. I will check with  
17 her, but call her tomorrow and make sure that everybody  
18 knows that that's what's going to happen.

19 MR. HULSE: Thank you, Jan.

20 MAGISTRATE JUDGE NOEL: Is that it for everybody  
21 on everything?

22 MS. CONLIN: It is for us, Your Honor.

23 MR. BLACKWELL: It is for us as well, Your Honor.

24 THE COURT: All right. Thank you very much.

25 Thanks to everybody who was on the phone, and we are in



1 recess.

2 (Court adjourned at 10:54 a.m.)

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9 I, Maria V. Weinbeck, certify that the foregoing is  
10 a correct transcript from the record of proceedings in the  
11 above-entitled matter.

12  
13 Certified by: s/ Maria V. Weinbeck

14 Maria V. Weinbeck, RMR-FCRR  
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